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No. 516

IN THE

Supreme Court of the United States

October Term, 1968

HARRY S. BERBERIAN, *Petitioner*

v.

COMMONWEALTH OF PENNSYLVANIA, *Respondent*

Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. ———

HARRY S. BERBERIAN, *Petitioner*

v.

COMMONWEALTH OF PENNSYLVANIA, *Respondent*

Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

Petitioner, Harry S. Berberian, prays that a Writ of Certiorari, issued to review the decision of the Supreme Court of Pennsylvania for the above entitled case, refusing to hear the appeal of petitioner from the judgment of the Superior Court of Pennsylvania, affirming the judgment of sentence of the Court of Quarter Sessions for the County of Lancaster of March Sessions, 1966, Numbers 63 and 64. The opinion of the Supreme Court of Pennsylvania was filed on July 18, 1968.

OPINION BELOW

The memorandum opinion of the Supreme Court of Pennsylvania, filed July 18, 1968 is appended to this petition as appendix A.

JURISDICTION

The memorandum opinions of the Supreme Court of Pennsylvania (appendix A) and the Superior Court of Pennsylvania, (appendix B) affirmed the judgment of sentence of the Court of Quarter Sessions for the County of Lancaster as of March Sessions, 1966, Numbers 63 and 64.

A copy of the opinion of the lower court is attached and appended to this petition as appendix C.

The jurisdiction of this court is confirmed by the Act of June 25, 1948, C 646, 62 Stat. 728, 28 U.S.C. §1254, which provides for review of final judgment or decrees rendered by the highest court of a state by writ of certiorari where any right is claimed under the constitution.

QUESTIONS PRESENTED

1. Is there a need for this Court, at this time, to decide the issue of whether in a case where a witness is erroneously ordered by the trial court to testify on behalf of the prosecution on threat of imprisonment, after the witness has properly claimed the privilege against self-incrimination, a defendant is denied due process of law in a fair trial by the use of such unconstitutionally compelled testimony?

(Answered in the negative by the court below.)

2. Has a defendant in a criminal trial been denied due process of law where the prosecution, in the presence of a jury, calls a witness to the stand and obtains from the witness a claim against self-incrimination where the prosecutor knew in advance that the witness would refuse to testify and where the prosecutor did not seek to have a ruling on a claim first made out of the hearing of the jury?

(Not answered by the court below.)

3. Is a defendant in a criminal trial denied the right to a fair trial and the right to due process of law where the trial court reiterates and revives to the jury evidence which no longer was properly in the case?

(Answered in the negative by the court below.)

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are the Fifth and Fourteenth Amendments providing in part that "No person shall . . . . be deprived of life, liberty or property without due process of law . . . nor shall be compelled in any criminal case to be a witness against himself."

HISTORY OF THE CASE

Appellant, a doctor practicing in Lancaster, Pennsylvania, for many years, was indicted and tried for allegedly having given to two women the name and address of a Philadelphia abortionist.

One of the women, a Miss Melody McFarland, was called as a Commonwealth witness, but declined to testify on the grounds of self-incrimination. Prior to her being called as a witness, the Court and the District Attorney had been advised by her attorney that she would decline to testify. Without first obtaining a ruling from the Court as to the validity of the claim of privilege, Miss McFarland was called to the stand and, in the presence of the jury, declined to testify. Although her testimony clearly incriminated her in the crime of fornication, as well as other crimes, her exercise of the self-incrimination privilege was overruled and on threat of a prison sentence she was compelled to testify. The testimony of Miss McFarland and other Commonwealth witnesses failed to establish the existence of a conspiracy involving the appellant to obtain an abortion for Miss McFarland, and a demurrer was sustained as to the only indictment relating to her. However, the Court did not instruct the jury at any time that it should not consider any of the testimony relating to Miss McFarland in arriving at its verdict on the other two indictments involving another woman. Rather, the Court, on three separate occasions during its instruction to the

jury, made reference to the evidence pertaining to the incident for which a demurrer had been sustained and was no longer in the case.

Additionally, there was testimony from a Mrs. Elaine Ressler that she had also been given the name and address in Philadelphia of a woman who might help her terminate an unwanted pregnancy. The abortionist, one Helen Harris, testified for the Commonwealth that in her only conversation with the appellant pertaining to Mrs. Ressler, he merely asked if she could help Mrs. Ressler, and she agreed to see what she could do. Nothing else was said about the matter. Although the appellant denied having given Mrs. Harris' name and address to Mrs. Ressler, and having presented numerous character witnesses on his own behalf, he was found guilty of having been an accessory before the fact to Mrs. Ressler's abortion and of conspiracy in regard to the same abortion.

Motions for new trial and in arrest of judgment were denied. Although the appellant has never been convicted of any offense he was sentenced to serve a term of imprisonment of not less than six nor more than twelve months. From this judgment of sentence an appeal was taken to the Superior Court of Pennsylvania. On February 13, 1968, the Superior Court of Pennsylvania affirmed the judgment of the lower court. A petition for allowance of appeal was taken to the Supreme Court of Pennsylvania and the petition was denied on July 18, 1968.

ARGUMENT

A. The Appellant Was Denied a Fair Trial and Due Process of Law by the Commonwealth's Use of Testimony which Was Improperly Compelled from a Witness Who Had Claimed the Fifth Amendment Privilege against Self-Incrimination.

The appellant, Dr. Harry S. Berberian, was indicted in Bill No. 65, of March Term, 1966, for conspiracy to commit an abortion on a young woman by the name of Melody McFarland. During the course of the trial a Mr. Gingrich, the attorney for the witness Melody McFarland, twice advised the Court and the district attorney that Miss McFarland intended to exercise her privilege against self-incrimination and not testify if called as a witness by the Commonwealth (R. 50, 101-2). Despite this notice to the Commonwealth, the district attorney nevertheless called Miss McFarland to the stand, and as a result of questions put to her before the jury she twice refused to testify, exercising her privilege against self-incrimination. Argument was heard by the Court as to the basis for the claim of the privilege. The evidence established that Miss McFarland was an unmarried young woman who had gone to a woman abortionist in Philadelphia, allegedly having obtained her address from Dr. Berberian. No abortion was performed on her and she subsequently gave birth to an illegitimate child (R. 106-107). Her attorney argued that her testimony would implicate her in a number of crimes, including the charge of fornication. He called to the attention of the trial Judge, the Honorable William G. Johnstone, the opinion of Judge Wright in his dissent in *Commonwealth v. Fisher* (Appeal of Snyder), 189 Pa. Superior Ct. 13 (joined by Judges Watkins and Gunther). Judge Johnstone overruled the claim of privilege and declared that the Court could and would grant Miss McFar-

land immunity from prosecution (R. 107-108). Rather than face a summary conviction and imprisonment for contempt, Miss McFarland reluctantly agreed to obey the Court's order and testified (R. 108).

There is no doubt that the right to invoke the Fifth Amendment privilege against self-incrimination was entirely one belonging to the witness McFarland. However, it is likewise clear that one whose trial is tainted by improperly ordered and compelled evidence is denied a fair trial and due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

Unless a defendant in a criminal case is protected from the use of illegally and unconstitutionally compelled testimony against him, the way is open for a prosecutor to run roughshod over the rights of witnesses in an effort to obtain a conviction of a particular defendant. Such a prosecutor need not concern himself about his abuse of constitutional rights, since there is little likelihood he would attempt to use their compelled testimony against them. However, his ends are achieved at the expense of the particular defendant who has been the victim of the unconstitutionally compelled testimony.

It is conceivable, though illusory, that the Court could have mitigated, after the demurrer was sustained, the prejudicial impact of the unconstitutionally compelled testimony by a careful and considerate instruction to the jury. However, none was ever given. There can be no doubt that appellant's complaint against the illegally compelled testimony is well taken, despite the sustaining of his demurrer, in the absence of any instruction to the jury by the trial Court.

B. It Was Prejudicial Misconduct for the District Attorney to have Called a Witness to the Stand and Obtain from the Witness a Claim against Self-Incrimination in the Presence of the Jury, where the District Attorney Knew in Advance that the Witness Would

Refuse to Testify and where the District Attorney Did Not Seek to Have a Ruling on the Claim First Made out of the Hearing of the Jury.

Prior to the witness Melody McFarland being called to testify against the appellant, her attorney, Mr. Gingrich, on two separate occasions advised the district attorney and the Court that his client did not intend to testify as a witness on behalf of the Commonwealth but rather was going to exercise her privilege against self-incrimination (R. 50, R. 101-102). Despite this warning, the district attorney persisted in calling Miss McFarland to testify in the presence of the jury. After answering as to her name and address she declined to answer any questions thereafter, invoking the privilege against self-incrimination. This was followed by argument by counsel as to the manner in which the district attorney was carrying on his questioning. All of this took place in the presence of the jury. Only then was the jury excused by the Court and the balance of the argument in regard to the right of the witness to exercise her privilege discussed by counsel with the Court.

It is clear that such conduct by the district attorney was erroneous and prejudicial to the appellant. This remained so even though the Court overruled, in error, the witness' claim to exercise the right against testifying on the grounds of possible self-incrimination. The harm done the appellant is the creation of an aura of suspicion and connivance in the minds of the jurors who were present. This effect was the subject of comment by the Supreme Court of Colorado in *DeGesualdo v. Colorado*, 364, P. 2d 374, where the Court stated:

> "In holding that the conduct in question was reversible error, we take notice that in the public mind *an odium surrounds the claim of constitutional privilege by a witness* in refusing to testify on the ground that his testimony would tend to incriminate him. This is an aggravating factor. A district attorney,

although in a sense a partisan, is a judicial officer sworn to uphold the Constitution and obligated to refrain from invalid conduct creating an atmosphere prejudicial to the substantial rights of the defendant."

In this jurisdiction, a similar conclusion was arrived at by the Court of Appeals for the Third Circuit in *United States v. Tucker*, 267 F. 2d 212.

C. The Petitioner Was Denied Due Process of the Law and a Fair Trial where the Trial Court Revived and Reiterated to the Jury Evidence that Was no Longer Properly in the Case.

The testimony of Melody McFarland in its entirety, and portions of the testimony of policewoman Martin, Detective Corr, and Helen Harris, related entirely to Bill No. 65 of March Term 1966, in which the appellant was charged with conspiracy to commit an abortion on Melody McFarland. At the conclusion of the Commonwealth's case, the appellant's demurrer to this indictment was sustained. No other charge before the Court related to Melody McFarland, and no reference was made to her by the appellant.

The sustaining of the demurrer totally removed from the proper consideration of the jury any of the evidence that had previously been induced in regard to Melody McFarland. There was no proper basis for the jury to consider the testimony in regard to Miss McFarland in determining the guilt or innocence of the appellant on the remaining indictments dealing with the attempted abortion of Mrs. Ressler. *Loews, Inc., v. Cole*, 185 F. 2d 641; *Stewart v. Pen Argyl Nat. Bank*, 307 Pa. 328, 334. Although this would seem eminently clear, the Court below gave no indication that it recognized this. The trial Court gave the jury no adequate instruction that it should (a) disregard entirely the evidence it had heard in regard to

the McFarland charge and (b) gave no consideration to the evidence heard in the McFarland charge in regard to its determination of guilt or innocence on the indictments dealing with Mrs. Ressler. Further, the trial Court revived and emphasized the McFarland testimony, which was no longer in the case, by making three references to it in its charge to the jury.

First, the Court referred to the testimony of policewoman Martin and reiterated her testimony in which she stated she had followed Miss McFarland on a train and then by car as she went to an address in Germantown, which was the home of Helen Harris. The Court added its own observation of this testimony, and declared,

> "You will note the uniformity in approaching the home of Helen Harris. Elaine Ressler later testified that she followed the same route that Melody followed getting off in the 200 block then walking to the home of Helen Harris. Was this by chance that they both did this or was this by design, by instruction?" (R. 149).

The Court here drew a parallel between the testimony in regard to the McFarland charge, which was no longer before the Court or the jury, and the testimony in the Ressler charge, which the jury was yet to decide. Could the jury draw any inference from this statement by the Court other than that it was proper for it to make comparisons between the circumstances involving each of the two women?

Second, the Court further referred to the use of the word "tonsils" which was supposed to serve as an introduction between Miss McFarland, Mrs. Ressler and Helen Harris. The Court stated, at R. 151:

> "[Helen Harris] said that she had given her telephone number to the doctor so as to arrange a time to have her child's tonsils removed. Remember, that the *girls*' at least Elaine Ressler, when she called on

the telephone, said that this is tonsils, according to instructions which she said she received from Dr. Berberian."

The reference to "girls" in the plural clearly related to the only two women in the case involved in attempting to obtain an abortion from Helen Harris, namely, Miss McFarland and Mrs. Ressler. But, of course, the testimony of McFarland was no longer in the case by virtue of the demurrer.

Because of its possible impact, the fact that the McFarland testimony was never clearly and unambiguously taken away from the jury requires that the conviction in the instant case be set aside.

WHEREFORE, for the reasons stated above, petitioner strongly urges that this Court grant review on Writ of Certiorari from the decision of the Supreme Court of Pennsylvania in denying defendant's appeal.

Respectfully Submitted:

BERNARD L. SEGAL,
NEEDLEMAN, NEEDLEMAN, SEGAL & TABB
Counsel for Petitioner

APPENDIX "A"

IN THE SUPREME COURT OF PENNSYLVANIA

No. 143-A Misc. Docket No. 16

(No. 1155, 1156, October Term, 1967)

HARRY S. BERBERIAN, *Petitioner*

v.

COMMONWEALTH OF PENNSYLVANIA

PETITION FOR ALLOWANCE OF APPEAL

PER CURIAM — Filed: July 18, 1968

Petition Denied

APPENDIX "B"

IN THE SUPERIOR COURT OF PENNSYLVANIA

Nos. 1155, 1156, October Term, 1967

HARRY S. BERBERIAN, *Petitioner*

v.

COMMONWEALTH OF PENNSYLVANIA

Appeal from the Judgment of Sentence of the Quarter Sessions Court of Lancaster County at Nos. 109, 110 December Sessions, 1965.

PER CURIAM — Filed: February 13, 1968

Judgment of sentence affirmed, and the defendant is directed to appear in the court below at such time as he may be there called, and that he be by that court committed until he has complied with the sentence, or any part thereof which had not been performed at the time the appeal was made a supersedeas.

APPENDIX "C"

IN THE COURT OF QUARTER SESSIONS OF LANCASTER COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

HARRY S. BERBERIAN

March Term, 1966, No. 66 Accessory before the fact

March Term, 1966, No. 64 Conspiracy

Motions in Arrest of Judgment and for a New Trial

OPINION

JOHNSTONE, J.

The defendant was indicted and tried on two indictments charging conspiracy, and one indictment charging accessory before the fact. At the close of the Commonwealth's testimony the defendant demurred to the indictment charging conspiracy to March Term, 1966, No. 65 and the court sustained the demurrer. Demurrers to the other two indictments were overruled, and the defendant was found guilty on both indictments by the jury.

Following the guilty verdict, the defendant filed a motion in arrest of judgment and a motion for a new trial. These motions have been argued before the court sitting en banc.

In Commonwealth v. Donatelli, 202 Pa. Superior Ct. 565 at page 568 the court stated, "In considering a motion in arrest of judgment, the court must ignore the evidence of the defendant and his witnesses which the jury had the privilege of rejecting, and must accept as correct all the evidence which supports the verdict, whether offered by the Commonwealth or the defendant, and must draw from

the evidence such reasonable inferences as will support the verdict."

In determining whether the evidence was sufficient to sustain the verdict of guilty on the charge of conspiracy, we will be guided by the statement of the Supreme Court in Commonwealth v. Yobbagy, 410 Pa. 172, at page 176, "Evidence to sustain a charge of conspiracy must be such as reasonably and naturally justifies an inference of guilt of the accused and is of such volume and quality as to overcome the presumption of innocence and satisfy the jury of the accused's guilt beyond a reasonable doubt. A conviction will not be allowed to stand if it is based solely upon suspicions and conjectures."

While the testimony in this case may not amount to an explicit or formal agreement to commit the offense of abortion, it comes as close to that as can ever be expected in a case of this kind. The victim, Elaine Ressler, testified that she went to the defendant's office on the first occasion with her sister and explained to the defendant that she was pregnant and because she already had three children she did not want a fourth one. The defendant, an osteopathic physician, told her that he could not help her, but that he knew of someone who could, and the cost would be $400.00. Mrs. Ressler returned to the defendant's office in two or three week's time and told him that she wanted to go through with the abortion. She paid the defendant $200.00 and was told by him that she would need the other $200.00 when she got to the abortionist's home in Philadelphia.

The defendant told Mrs. Ressler that he would make the necessary arrangements in Philadelphia. On her third visit to the doctor's office Mrs. Ressler was told by the defendant that he had made the arrangements, and that she was to go to Philadelphia by train on December 15th; he supplied her with the telephone number she was to call on her arrival in Philadelphia; and told her what she was to say when someone answered the telephone. These instruc-

tions were written by Mrs. Ressler on paper furnished her by the defendant, and these written instructions were produced in court. When she arrived in Philadelphia she called the telephone number given her by the defendant and told the person who answered that she was "Tonsils", as directed by the defendant.

Helen Harris testified that Mrs. Ressler came to her home in a pregnant condition, paid her $200.00, and an instrument was used on Mrs. Ressler to induce an abortion. She further testified that the defendant had called her and made the arrangements to have Mrs. Ressler come to her home for the purpose of an abortion.

The sister of Mrs. Ressler testified that she was in the defendant's office on the first visit and heard the doctor tell her sister that he could do nothing for her pregnancy, but could send her to someone who could help her. The cost was to be $400.00, of which the defendant was to receive $200.00. Mrs. Ressler was instructed to return to the doctor's office after she had thought over the situation.

In our opinion the foregoing summary of the testimony clearly indicates a combination between the defendant and Helen Harris to commit an unlawful act. The defendant received one-half of the consideration involved, and specifically made an arrangement with Helen Harris to receive Mrs. Ressler at a specific time for the purpose of committing an abortion. Helen Harris testified that the defendant called her and made an arrangement with her to have Mrs. Ressler come to her home for the specific purpose of having an abortion performed. This, in our judgment, is sufficient upon which to support a verdict of guilty of conspiracy. We see no merit in the defendant's argument that he merely sold information to Mrs. Ressler about a well known abortionist for the sum of $200.00.

The court charged the jury that "an accessory before the fact is one who plans, cooperates, assists, aids, counsels or abets in the perpetration of a felony, but who is absent when the crime itself is committed". There is no doubt from the record before us that an abortion w[illegible]

committed on Mrs. Ressler and that the defendant was not present at the time of its commission. The court later charged "Your second problem is to determine whether or not from the testimony you heard, the Commonwealth has established beyond a reasonable doubt that this defendant did something in the way of abetting, or aiding, or procuring, or counseling in the perpetration of a felony, an abortion."

The defendant takes exception to the use of the word "procuring" by the court in its charge, and claims that because of the weakness in the Commonwealth's case, the court altered the definition of an accessory before the fact to fit the facts in this case. The word "procure", according to Webster's New International Dictionary 2d ed. is defined as, "to contrive; to effect; to cause; to induce; and to solicit." The word "plan", also according to the same dictionary, is defined as "to scheme; to contrive". The usual words used to describe an accessory before the fact all have different shades of the same meaning and the word "procure" is synonymous with these words.

In Com. v. Bitler, 133 Pa. Superior Ct. 268, President Judge Keller stated for the Superior Court at page 281, "The distinction between one who commits a misdemeanor and one who causes or *procures* it to be done, is that the former includes the actual perpetrator and those present, aiding and assisting, and the latter embraces those who counsel, abet, cause or *procure* it to be done, but are neither the actual perpetrators nor present, aiding and assisting, at its commission." (Emphasis added). In Campbell v. Com., 84 Pa. 187 the court held that the defendant, who was not present at the murder but was an accessory before the fact, could be convicted of murder if the jury found that he procured the murder. To the same effect, see Com. v. Strantz, 328 Pa. 33, 42.

The defendant claims that the record does not support a verdict of guilty of the charge of being an accessory before the fact since he was nothing more than a messenger. It

is conceded that if the defendant had merely given or sold Mrs. Ressler information as to where she could have an abortion performed, he would not be guilty of being an accessory. But the defendant's activities went far beyond the passing of information. He was an integral part of a chain of events which ended in an abortion being performed on the victim. He set up an appointment with the abortionist to abort Mrs. Ressler and instructed the victim where to go and when, and how to identify herself when she arrived. Without the defendant's help and assistance in arranging for the abortion to be performed, Mrs. Ressler would not have arrived at the home of Helen Harris and no offense would have been committed. The defendant even received one-half the cost of the abortion, making him an equal partner with the actual abortionist. All of this was denied by the defendant but apparently the jury accepted the Commonwealth's evidence as true by returning a verdict of guilty.

In connection with the defendant's motion for a new trial, we have already discussed the use of the word "procure" by the court in its charge, to which objection was taken. Only a general exception was taken to the balance of the charge and unless it contained fundamental error, no advantage accrues to the defendant: Zeman v. Cannonsburg, 423 Pa. 450. This leaves only the question of the admissibility of the testimony of Melody McFarland and the refusal of the court to strike her testimony from the record.

The motion to strike the testimony of Melody McFarland came at the close of her testimony but before the close of the Commonwealth's case and the sustaining of the defendant's demurrer to the conspiracy charge involving Melody. A motion to strike her testimony after the successful demurrer undoubtedly would have been granted and the defendant would then have had no complaint.

Objection was made by defendant's counsel to the court's instruction to Melody, the victim in a charge of conspiracy to commit abortion and one who had not been charged with any criminal offense, to testify after she had

claimed her right to remain silent on the ground that anything she might say would tend to incriminate her. No objection was made that the testimony of Melody was immaterial or irrelevant to the conspiracy indictment being tried. The only real objection made to Melody's testimony was the she did not say enough to make out a case of conspiracy and the court agreed with this contention and sustained the demurrer.

In its charge, the court instructed the jury that the case against the defendant involving Melody McFarland had been dismissed by the court for the reason that there was no proof of a combination or agreement between the defendant and Helen Harris sufficient to support the charge. The jury was told not to consider the case involving Melody, and no comment was made about her testimony by the court. We believe that this instruction effectively took away from the jury any consideration of the testimony given by Melody.

The defendant contends that the admission of Melody's testimony was improper because it was coerced from her by the court under an improper grant of immunity. Assuming for argument sake only that Melody's constitutional right was violated and that the court's grant of immunity was without authority, how does this adversely effect the defendant? The privilege of claiming immunity from testifying did not rest in the defendant since the privilege is a personal one and can only be claimed by the person involved: Com. v. DeMasi, 234 Pa. 570; Com. v. Spallone, 154 Pa. Superior Ct. 282; Rogers v. United States, 340 U. S. 367. If anyone has been hurt, it is Melody and she is not here complaining. What she testified to at the trial was relevant and material to the charge against the defendant and he has made no objection to her testimony as such, except that Melody's rights were violated. The defendant elicited information from Melody on cross-examination and it was this information which was responsible for the sustaining of the defendant's demurrer to the charge involving Melody.

The defendant argues that Melody's testimony was illegal in the same sense as the evidence used to convict in Mapp v. Ohio, 367 U. S. 643 and that he was denied due process of law. This high sounding argument loses sight of the material and differentiating fact that it was not the defendant's right which was violated but Melody McFarland's, assuming her rights were violated. What happens to Melody now that she has testified or what might have happened if she had refused to testify is no concern of the defendant's since only Melody could claim her right to remain silent and only Melody stands to suffer by reason of her testimony.

We have read and reread Snyder Appeal, 398 Pa. 237 and are not convinced that the case rules the present situation. In the first place Melody McFarland, at the time of this trial, nor since, was not charged nor threatened to be charged with any criminal offense. In the second place she, being a victim, could not be guilty of abortion or conspiracy to commit abortion: Snyder Appeal, supra, page 246. It is argued that Melody testified she was pregnant and must, therefore, have had sexual intercourse and, being unmarried, could be prosecuted for fornication. When and where Melody may have committed fornication certainly was immaterial to the charge of conspiracy against the defendant and would have been excluded from the record if any attempt had been made to elicit such information. Without any information as to when or where Melody engaged in the act of fornication, no one would be in a position to prosecute her. As a matter of fact, Melody testified to no more than that she was pregnant, which in itself is no criminal offense. Her testimony did not in fact incriminate her and her fear of incrimination was groundless.

In Snyder Appeal, supra, at page 241, the Supreme Court stated, "A witness placed in the situation of responding to questions which can possibly incriminate him must be allowed some latitude in determining whether he should or should not answer." We do not understand this to

mean that the witness is the sole arbiter of whether or not he should testify: Com. v. Bell, 145 Pa. 374, 388. If there is no basis in fact, such as in the present case, that testimony will tend to incriminate her, then the witness has no right to refuse to testify.

We are led to the conclusion that the defendant was not hurt by Melody's testimony, nor was she, and that the court's direction to Melody to testify under the circumstances existing does not form the basis for granting the defendant a new trial. We are further of the opinion that no fundamental error was committed by the court in granting Melody McFarland immunity from prosecution under the circumstances existing: Com. v. Bell, supra.

AND NOW, March 31, 1967, the defendant's motions in arrest of judgment and for a new trial are dismissed and the defendant is directed to appear for sentence at the call of the District Attorney.

By the Court:

W. G. JOHNSTONE, JR.

OPINION

IN THE COURT OF QUARTER SESSIONS OF LANCASTER COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

HARRY S. BERBERIAN

March Sessions, 1966, No. 66 Accessory before the fact

March Sessions, 1966, No. 64 Conspiracy

Motions in Arrest of Judgment and for a New Trial

OPINION SUR RE-ARGUMENT

JOHNSTONE, J.

Re-argument in this case was granted on the defendant's motion based on the allegation that the opinion in Commonwealth v. Carrera, 424 Pa. 551 controlled the present case. Our original opinion was handed down on March 31, 1967, after the Carrera decision on March 14, 1967 but before the case was reported in the Advance Reports of April 28, 1967.

The Carrera case, as we understand it, establishes two principles: first, that an unmarried abortion victim may refuse to testify on her apprehension of the danger of prosecution for fornication, and second, that a district attorney has no authority to grant a witness immunity from criminal prosecution. It follows that Melody McFarland in the present case was justified in claiming her privilege against self-incrimination and that she could not have been held in contempt for refusing to testify. However, no attempt was made by the district attorney to grant immunity, this was done by the trial judge and specifically covered the offense of fornication.

Melody McFarland, the only person for whom the constitutional safeguard was intended, has not been hurt up to this time by testifying and the Court effectively removed the remote possibility of her ever being hurt. Commonwealth v. Bell, 145 Pa. 374, 391. There is no statutory or constitutional authority providing for the grant of immunity to witnesses from criminal prosecution by the Court, nor is there any inhibition against such grant of immunity. In Erie City's Appeal, 297 Pa. 260, the Supreme Court stated at page 270, "The law is a practical science, and, in the absence of statutory inhibition, our Courts may take such steps, regarding matters properly before them, as will promote the administration of justice." Although the Commonwealth did not make out a case of conspiracy against the defendant in the indictment involving Melody McFarland, at the time she was called to testify, the ends of justice demanded that she be granted immunity and required to testify.

However, if it should be decided on appeal that the grant of immunity was improper and ineffectual so far as Melody McFarland was concerned, the testimony she gave was relevant to the issue involved and not illegal in the sense claimed by the defendant. Furthermore, a demurrer to the evidence in the case involving Melody McFarland was sustained and her testimony was not used against the defendant in the companion case being tried at the same time and in which the defendant was found guilty.

The jury was told in the trial judge's charge, "I am skipping over the testimony of Melody McFarland, since the charge of conspiracy as to her has been dismissed by the Court. This is also a charge of conspiracy and at the close of the testimony, the Defendant demurred to that testimony, which says in effect, accepting as true everything the Commonwealth has said, they haven't said enough to make out a case. The Court has agreed with them. There is no definite proof here there was any combination or

agreement between the Defendant and Helen Harris concerning Melody McFarland, therefore that case is dismissed and you will not consider it." At no other place in the charge was Melody McFarland mentioned except that a Philadelphia Policewoman testified Melody was in the home of Helen Harris when the police raided it.

The defendant claims that the Court by inference referred to the testimony of Melody McFarland in its charge. This claim is not substantiated by the record. At page 149 of the notes of testimony the Court stated, "We have the testimony of Policewoman Martin who tells us that she followed Melody McFarland on the train from Coatesville to Philadelphia, then in a cab to the 200 block of Upsal Street and then to 369 East Upsal Street, the home of Helen Harris. You will note the uniformity in approaching the home of Helen Harris. Elaine Ressler later testified that she followed this same route that Melody followed getting off in the 200 block then walking to the home of Helen Harris. Was this by chance that they both did this or was this by design, by instruction?"

The record is clear beyond question that Officer Theresa Martin testified to the same approach to the home of Helen Harris by Melody McFarland as did Elaine Ressler when testifying concerning her approach to Helen Harris's home. The Court was unquestionably referring to the testimony of Officer Martin and Elaine Ressler and not to anything stated by Melody McFarland.

The second alleged inference by the Court to the testimony of Melody McFarland is in the following statement at page 151, "Remember, that the girls, at least Elaine Ressler, when she called on the telephone, said that this is tonsils, according to instructions which she said she received from Doctor Berberian." The testimony of Policewoman Martin was to the effect that Melody made no telephone call before taking a cab to the Harris home. This was in conflict to Melody's testimony but no comment was made by the Court to any telephone call by Melody nor to

any conflict in the testimony of witnesses Martin and McFarland.

The third alleged inference by the Court in its charge to the testimony of Melody McFarland appears at page 157 where the Court said, "There are at least two witnesses here who said, that the price of the abortion was $400.00; $200.00 to the Defendant and $200.00 to Helen Harris." The Court's statement is correct and two of the witnesses who gave that testimony were Elaine Ressler and her sister, Arlene Scheetz (N.T. 99). No reference to Melody McFarland was made or intended.

Any and all testimony given by Melody McFarland was effectively removed from consideration by the jury in the Court's charge and the Court did not directly or by inference submit any of Melody's testimony for consideration by the jury in their disposition of the indictment involving Elaine Ressler. The consolidation of the Ressler and McFarland cases for trial was proper and was done without objection on the part of the defendant. Commonwealth v. Patrick, 416 Pa. 437. The indictment involving Melody McFarland was disposed of by the Court on the defendant's demurrer and the jury was told that the case was dismissed and they were not to consider it. The defendant received from the Court every safeguard to which he was entitled with respect to the testimony forced from Melody McFarland. No fundamental error in the Court's charge has been called to our attention, which is the only benefit to be derived by the defendant from a general objection to the charge: Segriff v. Johnston, 402 Pa. 109.

The fact that the defendant's motion to strike the testimony of Melody McFarland from the record was denied at the time the motion was made caused no harm to the defendant. When the Court told the jury in its charge to ignore the case involving Melody, the effect so far as the defendant was concerned was just as good, if not better than the granting of the motion during the course of the trial. The defendant was fairly tried and, in our opinion, the verdicts of the jury should stand.

AND NOW, August 11, 1967, the defendant's motions for a new trial and in arrest of judgment are again dismissed and the defendant is again directed to appear for sentence at the call of the District Attorney.

By the Court:

W. G. JOHNSTONE, JR.